2012 IL App (4th) 110234-U

Filed 9/18/12

NO. 4-11-0234

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. EDWARD C. LASCOLA, Defendant-Appellant.	)	Appeal from Circuit Court of Logan County No. 01CF106 Honorable Elizabeth A. Robb, Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Pope and McCullough concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court did not err in finding defendant, a *pro se* petitioner under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2008)), failed to make a substantial showing he was denied the effective assistance of counsel when trial counsel failed to file a renewed motion for change of venue.

(2) Defendant failed to establish postconviction counsel provided unreasonable assistance when postconviction counsel did not attach documents or evidence necessary to support his allegations trial counsel provided ineffective assistance of counsel.

¶ 2 In January 2010, defendant, Edward C. Lascola, serving a 40-year sentence for first degree murder (720 ILCS 5/9-1(a)(1) (West 2000)), filed an amended petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2008)). Defendant maintained trial counsel provided ineffective assistance by filing an insufficient motion for change of venue or by failing to file an amended motion. In December 2010, the trial court

granted the State's motion to dismiss defendant's petition. Defendant appeals, arguing (1) the court erred by finding he had not made a substantial showing he was denied the effective assistance of counsel when trial counsel's motion for change of venue was inadequate and counsel did not amend it; and (2) postconviction counsel was ineffective for failing to add documents or other supporting evidence to support the venue-related allegations in the postconviction petition. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In June 2001, defendant was charged with the first degree murder of Daneysia Williams, the infant daughter of his girlfriend, Kimberly Williams. Kimberly was also charged with first degree murder.

¶ 5 On October 15, 2001, defendant filed a motion for change of venue. In his motion, defendant alleged he could not receive a fair trial in Logan County because of media coverage and resulting prejudice against him. In support of his argument, defendant asserted the case "received extensive publicity" in the Logan County newspapers. Defendant attached an August 11, 2001, article from *The Courier* and three affidavits by Logan County residents, who averred, based on conversations "with the various citizens of Logan County," defendant could not receive a fair trial due to the pretrial publicity surrounding the case. The article attached to the motion was entitled, "Accused baby killer gets new lawyer, judge." The article reports Kimberly took Daneysia to the hospital and told personnel Daneysia choked while drinking from a bottle while taking an afternoon nap. The article reports Daneysia did not die as Kimberly claimed. Instead, the autopsy results indicated "Daneysia died from multiple lacerations to her liver due to blunt force stress to her lower chest and abdomen." The article further states the autopsy

revealed Daneysia had old fractures, which healed over time. The majority of the article sets forth procedural matters, such as reporting a new attorney had been appointed, the case continued, and a new judge assigned.

¶ 6 On October 26, 2001, a hearing was held on defendant's venue motion. Defense counsel argued since defendant had been arrested there had been "a plethora of newspaper articles written" about the matter. This, according to defense counsel, included the one attached to the motion in which defendant was described as "accused baby killer." Defense counsel argued such inflammatory language compromised defendant's ability to receive a fair trial in Logan County.

¶ 7 The trial court denied defendant's motion to change venue. The court concluded the affidavit requirements had been met, but recalled case law required more documentation than was provided. The court observed, although defense counsel referred to newspaper articles, defense counsel only included one article. The court told counsel "frequently in these kind of motions there is some kind of survey that's been done indicating that people have read about this case." The court further concluded the citizens' affidavits did not quantify how many people the affiants had spoken to and did not indicate how the affiants reached the conclusions made. At the end of the court's comments, defense counsel stated he would like to renew the motion at a later date with other articles, but he "chose the one attached that's inflammatory." The court agreed it would not hesitate to grant such a motion at any time evidence showed defendant could not receive a fair trial.

¶ 8 From September 30 until October 8, 2002, a jury trial was held. No one testified to having seen defendant cause the physical injury that led to Daneysia's death. Individuals

testified they saw defendant previously abuse Daneysia, including tossing her onto a bed, spanking her across her legs, "snatch[ing] her up hard" by one arm, and lifting her "really hard." One witness testified, on the morning of Daneysia's death, defendant was alone with a crying Daneysia in a bedroom and the witness heard a loud thump, like something hitting a wall, followed by increased crying. Experts testified regarding the time and cause of Daneysia's death. One testified Daneysia's fatal injury could have been caused by her having been thrown against a wall. Another expert testified Daneysia died as a result of a nonaccidental, broad-surface blunt trauma to the lower chest and upper abdominal region. Defendant was found guilty of first degree murder. 720 ILCS 5/9-1(a)(1) (West 2000). He was sentenced to 40 years' imprisonment.

¶ 9 On October 29, 2002, in the State's case against Kimberly Williams, the trial court held a hearing on Williams' motion for change in venue. The court granted the motion. The record shows, in December 2001, Williams's attorney sought funds to obtain an expert to conduct a jury survey. The court granted the funds for this purpose in January 2002. The record does not show the survey was ever submitted to the trial court or the State until after this hearing.

¶ 10 Defendant pursued a direct appeal of his conviction. Defendant argued (1) his trial counsel had a *per se* conflict of interest in representing him and a potential witness against him, (2) he was denied a fair trial because the trial court allowed evidence of prior bad acts and inadmissible hearsay related to those acts, and (3) he was not proved guilty beyond a reasonable doubt. This court found no reversible error occurred and affirmed. *People v. Lascola*, No. 4-02-1037 (July 28, 2004) (unpublished order under Supreme Court Rule 23).

¶ 11 In May 2006, Lascola filed a *pro se* postconviction petition under the Act. In his petition, Lascola argued trial counsel was ineffective for failing to move properly for change of

venue. The trial court appointed counsel and, in February 2007, defendant filed an amended postconviction petition. In this amended petition counsel did not adopt defendant's arguments, but added new arguments, such as trial counsel was ineffective for failing to conduct a survey to support a motion for change of venue. Despite adding new arguments, postconviction counsel did not attach any evidence to support the claims in the amended complaint. Because postconviction counsel failed to attach supporting evidence, defendant could not attain review of claims he set forth in his *pro se* petition and could not attain review over the amended claims. We concluded such assistance was not reasonable, and reversed the dismissal of the amended petition and remanded to give defendant the opportunity to replead his postconviction petition with the assistance of counsel. *People v. Lascola*, No. 4-07-0509 (Apr. 13, 2009) (unpublished order under Supreme Court Rule 23).

¶ 12 In January 2010, on remand, defendant filed an amended postconviction petition. Defendant alleged he was innocent and he was denied the effective assistance of counsel in that trial counsel, in part, failed to correct and renew a procedurally insufficient motion for change of venue. Defendant asserted because the trial court "expressed its willingness to grant change of venue upon [the] filing of a sufficient motion and showing of proof" and because Kimberly, his codefendant, had been granted change of venue on similar grounds, trial counsel provided ineffective assistance by not acquiring photocopies of articles.

¶ 13 In December 2010, the trial court granted the State's motion to dismiss defendant's postconviction petition. The court concluded defendant forfeited the issue counsel was ineffective for failing to correct and renew his motion to change venue because he did not raise the issue in his direct appeal. The court further found defendant attached no evidence to support his

contention pretrial publicity negatively affected his trial and could not show counsel's conduct was objectively unreasonable or resulted in prejudice.

¶ 14 This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 Defendant maintains the trial court erred in dismissing his postconviction petition because he made a substantial showing he was denied his right to the effective assistance of counsel when trial counsel failed to correct and renew a procedurally insufficient motion for change of venue. Defendant emphasizes despite trial counsel's assertions to the court regarding "extensive" negative publicity, trial counsel only attached one newspaper article. Defendant further emphasizes despite the court's identification of the flaws with the support for the motion, which included affidavits that lacked specificity, trial counsel did not amend the motion. Defendant contends had counsel amended the motion as the court suggested, the motion would have been granted because the one in his codefendant's case was granted.

¶ 17 This case involves a second-stage dismissal under the Act. At the second stage of postconviction proceedings under the Act, counsel may be appointed. 725 ILCS 5/122-4 (West 2008). After counsel is appointed, counsel must comply with Supreme Court Rule 651(c) (Ill. S. Ct. Rule 651(c) (eff. Dec. 1, 1984)), which requires appointed counsel to (1) consult with petitioner either by mail or in person, (2) examine the record of the proceedings, and (3) make necessary amendments to the petition. Once an amended petition has been filed, the State may move to dismiss. 725 ILCS 5/122-5 (West 2008). When considering the State's motion, the trial court may hold a hearing and must consider all well-pleaded facts as true. *People v. Coleman*, 183 Ill. 2d 366, 380-81, 701 N.E.2d 1063, 1071 (1998).

¶ 18 Defendant argues, at the second stage, he made a substantial showing his trial counsel was ineffective. A defendant, under *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984), can prove his trial counsel failed to provide effective assistance by showing both of the following: (1) his counsel's "representation fell below an objective standard of reasonableness," and (2) without such error, there is a reasonable probability the trial's outcome would have been different. *People v. Young*, 341 Ill. App. 3d 379, 383, 792 N.E.2d 468, 472 (2003). Because a defendant must prove both prongs of the *Strickland* test to prevail, an ineffective-assistance-of-counsel claim can be resolved if we determine defendant cannot prove just one of the grounds. *People v. Little*, 335 Ill. App. 3d 1046, 1052, 782 N.E.2d 957, 963 (2003).

¶ 19 Defendant contends, because he is arguing trial counsel provided ineffective assistance by failing to file a meritorious motion, he may prove the prejudice prong by establishing a reasonable probability such motion would have been granted and it *might* have affected the trial's outcome. In support, defendant cites *People v. Moore*, 307 Ill. App. 3d 107, 111-14, 716 N.E.2d 851, 854-57 (1999), which involves allegations trial counsel was ineffective for failing to move to suppress evidence.

¶ 20 Defendant misinterprets *Moore*. The court, in *Moore*, adhered to the *Strickland* factors and found counsel, who failed to move to quash arrest and suppress evidence, could not be deemed incompetent unless there was "a reasonable probability that the result of defendant's trial would have been different even without counsel's failure." *Moore*, 307 Ill. App. 3d at 111, 716 N.E.2d at 854. To answer that question, the *Moore* court concluded the test was not whether the evidence that remained was sufficient to convict a defendant, but whether the defendant received a fair trial. *Moore*, 307 Ill. App. 3d at 111, 716 N.E.2d at 854. The *Moore* court

ultimately determined trial counsel's failure to move to suppress the evidence and quash arrest deprived defendant "of the *only* defense available to defendant given the evidence presented at trial" and greatly undermined the confidence in the result of the defendant's trial. (Emphasis in original.) *Moore*, 307 Ill. App. 3d at 114, 716 N.E.2d at 856.

¶ 21 The test of prejudice, which the *Moore* court applied, requires proof "counsel's errors were so serious as to deprive the defendant of a fair trial." *People v. Love*, 327 Ill. App. 3d 313, 324, 763 N.E.2d 829, 838 (2002). This standard is consistent with the one employed by Illinois courts when considering an appeal of an order denying a change-of-venue request. This review involves not considerations of the correctness of the ruling and the amount of publicity involved, but whether the defendant received a fair trial. See *People v. Taylor*, 101 Ill. 2d 377, 397, 462 N.E.2d 478, 487 (1984). Given the record, we find defendant received a fair trial.

¶ 22 A defendant is entitled to an impartial jury capable of deciding the case only on the evidence before it. *People v. Kirchner*, 194 Ill. 2d 502, 529, 743 N.E.2d 94, 108 (2000). "Exposure to publicity about a case is not enough to demonstrate prejudice because jurors need not be totally ignorant of the facts and issues involved in a case." *Kirchner*, 194 Ill. 2d at 529, 743 N.E.2d at 108. As our supreme court has stated, " '[i]t is unreasonable to expect that individuals of average intelligence and at least average interest in their community would not have heard of any of the cases which they are called upon to judge in court.' " *Kirchner*, 194 Ill. 2d at 529, 743 N.E.2d at 108 (quoting *Taylor*, 101 Ill. 2d at 386, 462 N.E.2d at 482). It is necessary, however, that a juror give assurance he will be able to set aside the information he acquired outside the courtroom, as well as any opinions he had formed, and determine the case strictly on the evidence heard in the courtroom. *Taylor*, 101 Ill. 2d at 386, 462 N.E.2d at 482.

¶ 23 Given the responses of the veniremen, it is clear defendant received a fair trial. Four of the 12 jurors had not been exposed to any publicity about the case. Of the remaining eight jurors, three had not read anything about the offense since it had occurred approximately one year before, two others read articles up to six months before, two recently read headlines but read no further due to pending jury duty, and one read no more than two articles about the case, with one just two weeks before trial. Of those who read the articles, each said they had not formed opinions about the case and could disregard anything he or she read. In addition, the jurors each stated the fact the victim was under the age of 12 would not affect their judgment. Moreover, the record does not indicate a troubling number of jurors were excluded for cause as a result of publicity.

¶ 24 Defendant contends jurors' assertions they have not formed an opinion regarding the guilt or innocence of an accused will not always be sufficient to protect a defendant's right to a fair trial, particularly when "news media exposes jurors to biasing information." In support, defendant relies on two cases: *Marshall v. United States*, 360 U.S. 310 (1959), and *People v. Taylor*, 101 Ill. 2d 377, 462 N.E.2d 478 (1984).

¶ 25 Both of defendant's cases are distinguishable. Both involved situations where the jury had been aware of inadmissible and highly prejudicial information. In *Marshall*, the petitioner had been convicted of unlawfully dispensing drugs without a prescription from a licensed physician. See *Marshall*, 360 U.S. at 310. *During* trial, the jury was exposed to newspaper articles that revealed information the trial court deemed too prejudicial to admit in the proceedings, such as the petitioner had two prior felony convictions, served a sentence for forgery, practiced medicine with a $25 diploma he had received in the mail, and testified before a

state legislature to writing and passing prescriptions for dangerous drugs. *Marshall*, 360 U.S. at 311. Jurors also saw an article which stated the petitioner's wife, with whom the petitioner had been arrested, had been convicted. *Marshall*, 360 U.S. at 312. In defendant's other case, *Taylor*, the accounts seen or heard by jurors gave rise to the inference defendant failed a polygraph test and, therefore, must be guilty, while a codefendant, who passed the polygraph test had been released. *Taylor*, 101 Ill. 2d at 388, 462 N.E.2d at 483.

¶ 26 Here, the information involved the death and abuse of an infant, but it did not show defendant had been convicted of similar offenses (*e.g.*, *Marshall*, 360 U.S. at 311-12) or had failed a lie-detector test on the issue (*e.g.*, *Taylor*, 101 Ill. 2d at 388, 462 N.E.2d at 483). Defendant has not made a substantial showing he was denied a fair trial and has not shown he was denied the effective assistance of counsel.

¶ 27 Defendant next argues postconviction counsel's assistance was unreasonable. Defendant argues counsel, to adequately present and prove his claims, should have attached affidavits, records, or other evidence necessary to show his trial counsel provided ineffective assistance of counsel in not acquiring a change in venue.

¶ 28 The right to counsel in postconviction proceedings under the Act is statutory. *People v. Jennings*, 345 Ill. App. 3d 265, 271, 802 N.E.2d 867, 872 (2003). For this reason, postconviction petitioners are entitled only to receive the level of assistance mandated by the Act, which is a reasonable level of assistance. *Jennings*, 345 Ill. App. 3d at 271, 802 N.E.2d at 872.

¶ 29 Supreme Court Rule 651(c) (Ill. S. Ct. Rule 651(c) (eff. Dec. 1, 1984)) was designed to assure the statutory reasonable level of assistance is provided to postconviction petitioners. See *Jennings*, 345 Ill. App. 3d at 271, 802 N.E.2d at 872-73. Rule 651(c) requires,

in relevant part, "appointed post-conviction counsel make 'any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions.' " *People v. Turner*, 187 Ill. 2d 406, 412, 719 N.E.2d 725, 729 (1999) (quoting Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984)). Rule 651(c) does not require appointed counsel to amend a *pro se* petition to add new claims. *Jennings*, 345 Ill. App. 3d at 272, 802 N.E.2d at 873. Our review of claims postconviction counsel failed to comply with Rule 651(c) is *de novo*. See *People v. Suarez*, 224 Ill. 2d 37, 41-42, 862 N.E.2d 977, 979 (2007).

¶ 30 In support of this argument, defendant relies on the decision in *People v. Johnson*, 154 Ill. 2d 227, 609 N.E.2d 304 (1993). In *Johnson*, our supreme court found postconviction counsel failed to provide a reasonable level of assistance to a postconviction petitioner when counsel failed to attach documentary support necessary to preserve the petitioner's postconviction claims. *Johnson*, 154 Ill. 2d at 248-49, 609 N.E.2d at 314.

¶ 31 We find no error here. Postconviction counsel's actions were adequate to preserve defendant's issue for postconviction review. In the postconviction petition, counsel supported defendant's claim by emphasizing the record from Williams's case, in which a change of venue was granted due to "massive negative pretrial publicity." This argument fails because the two cases are not the same. Defendant's motion for change of venue occurred before anyone had been tried and convicted for Daneysia's death. Williams's motion was granted after the media informed the public Williams's codefendant boyfriend had been convicted of killing her daughter.

¶ 32 The attachment of numerous articles was not necessary to preserve defendant's claim, because the amount of publicity is essentially irrelevant. As the case law establishes, when considering the propriety of a trial court's decision to deny a venue change, Illinois courts

generally consider not the amount of publicity involved or the correctness of the ruling, but whether defendant received a fair trial. See *Taylor*, 101 Ill. 2d at 397, 462 N.E.2d at 487.

¶ 33 III. CONCLUSION

¶ 34 For the stated reasons, we affirm the trial court's judgment. We grant the State its statutory assessment of $50 as costs of this appeal.

¶ 35 Affirmed.